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IN THE

Supreme Court of the United States

October Term, 1951

No. 85

IDONAH SLADE PERKINS,

Petitioner,

v.

BENGUET CONSOLIDATED MINING COMPANY, an alien business association known as a Sociedad Anonima, et al.,

Respondents.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Ohio (R. 278-286) is reported in 155 Ohio State 116.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 25, 1951, application for re-hearing was denied on April 18, 1951. The petition for writ of certiorari was filed on May 29, 1951, and was granted on October 8, 1951. The jurisdiction of this court is invoked under the provisions of 28 U. S. C. Section 1257 (3).

QUESTION PRESENTED

The Supreme Court of Ohio on its own motion held that even though Benguet Consolidated Mining Company, respondent herein, was a foreign corporation and doing business in Ohio, that personal service upon the President and General Manager was void as wanting in due process, because the cause of action was in no way related to the business or activities of the corporation in Ohio.

So far as individuals are concerned the court held that in transitory actions where personal service is obtained on an individual the action is maintainable in Ohio even though it arose outside of Ohio and was in no way related to the business or activities of the non resident. (See *Mattone* v. *Argentina*, 123 Ohio St. 393, Approved, R. 280.) The Supreme Court in Ohio held that so far as foreign corporations are concerned the activities of the corporation must be related to the doing business or the service will be void, solely because of the due process clause of the Fourteenth Amendment.

The question presented is whether in a state where there is no contrary rule of public policy, is the due process clause of the Fourteenth Amendment violated by service of summons on a foreign corporation where the basis of the cause of action is in no way related to the business or activities of the foreign corporation in Ohio. The second question is whether there can be one rule for non resident individuals, and a different rule for a foreign corporation, without violating Article IV, Section 2 of the Constitution of the United States, which seeks to prevent unjust discrimination.

STATUTE INVOLVED

The Supreme Court of Ohio did not declare any statute void, but held that process served upon a president and general manager was void and violative of the due process

clause because the cause of action did not arise in the state, and was not related to the business or activities of the corporation in the state. There is no statute or policy of the state in reference to such service; but Section 11290, Ohio General Code and Section 11276, Ohio General Code are pertinent.

> Section 11290, General Code: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."
>
> Section 11276, General Code: "An action other than one of those mentioned in sections eleven thousand two hundred and sixty-eight, eleven thousand two hundred and sixty-nine, eleven thousand two hundred and seventy and eleven thousand two hundred and seventy-one against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of, or debts owing to the defendant, or where such defendant is found, or where the cause of action or some part thereof, arose."

This case does not come within the exceptions of the statute, and the undisputed and admitted evidence shows that Benguet Consolidated Mining Company had deposits in both the New Richmond National Bank in Clermont County, Ohio, and in the First National Bank of Cincinnati, Ohio.

In *Mattone* v. *Argentina*, 123 Ohio St. 393, which was specifically approved by the Supreme Court of Ohio, the construction of these statutes was set forth by that court in the second paragraph of the syllabus:

> "Under existing statutes, the courts of this state have no discretion to refuse to entertain jurisdiction of a transitory tort action brought by a non resident against a non resident upon whom pursuant to Section 11276, General Code, personal service is had in the county wherein such jurisdiction is sought to be invoked."

That rule was specifically upheld in this case (R. 280), but was held not applicable to foreign corporations where the cause of action arose outside of the state, because of the due process clause of the Fourteenth Amendment.

STATEMENT OF CASE

Benguet Consolidated Mining Company is a sociedad anonima organized under the laws of the Philippine Islands, and engaged in the business of mining gold. While by its own admissions Benguet Consolidated Mining Company has been held to be a partnership, the Ohio Supreme Court held in this action that it was entitled to be considered a foreign corporation so far as service of process is concerned. From that portion of the ruling we have not appealed, but start with the premise that it is entitled to be considered a foreign corporation.

The petitioner, Idonah Slade Perkins, claimed ownership to stock in Benguet, which, if her contention is correct, it will be admitted totals 144,000 shares. The California courts, following a decision of the New York Court of Appeals, held that the petitioner was the owner of these shares in the Benguet Consolidated Mining Company. By way of attachment in California, she recovered from Benguet a judgment for a substantial portion of the *cash* dividends due on her stock. However, Benguet has refused to deliver to her the 120,000 shares of stock due her as stock dividends, and the balance of cash dividends. See *Perkins* v. *Guaranty Trust Co.*, 274 N. Y. 250, 8 N. E. (2d) 849, and *Perkins* v. *Benguet Consolidated Mining Company*, 55 Cal. App. (2d) 720, 132 Pac. (2d) 70, rehearing denied 55 Cal. App. (2d) 775, 132 Pac. (2d) 102, petition for certiorari denied 319 U. S. 774; 60 Cal. App. (2d) 845, 141 Pac. (2d) 19, certiorari denied 320 U. S. 803, 815.

Thereafter, on April 4, 1947 the petitioner brought two actions in the Court of Common Pleas of Clermont County,

Ohio, joining as defendants Benguet Consolidated, John W. Haussermann and the New Richmond National Bank. One action sought recovery of $68,400.00 for cash dividends declared, but never paid to petitioner. The second action was for $2,500,000.00 for damages for wrongfully withholding the stock due her.

Service of summons on Benguet Consolidated Mining Company was made in each case by serving a copy of summons on John W. Haussermann, president, general manager, controlling member and duly authorized representative agent of said company in the United States and State of Ohio.

On May 6, 1927, Benguet Consolidated Mining Company appeared specially by motion to quash the service of summons. The Court of Common Pleas of Clermont County quashed the service of summons on the ground that Benguet was entitled to be treated as a foreign corporation, and was not doing business in Ohio. The decision was directly contrary to a previous decision in the companion case in Hamilton County, Ohio, raising the identical questions on the identical facts, and between the same parties. See *Perkins* v. *First National Bank, et al.*, 37 Ohio Opinions 162.

The Court of Appeals affirmed the judgment of the Clermont County court. See 88 *Ohio Appeals* 118. A motion to certify the record was allowed by the Supreme Court of Ohio, and on the merits that court affirmed the decisions of the lower court. 155 *Ohio State* 116.

The Supreme Court of Ohio held that a sociedad anonima was entitled to be considered as a foreign corporation under Ohio law, but that *even the doing of business by a foreign corporation in Ohio* will not make the corporation subject to service of process, since the causes of action did not arise in the state and were in no way related to the business or activities of the corporation in the state. The

basis of the decision was solely because it was said the service of summons "would be void as wanting in due process of law within the meaning of that term as used in the Fourteenth Amendment to the Constitution of the United States."

The entire portion of the opinion of Judge Taft (R. 280-1) reads as follows:

> "If defendant is a corporation, then the judgments of the Court of Appeals must be affirmed.
>
> "Admittedly, defendant has not appointed any statutory agent upon whom service of process against defendant can be made in Ohio and defendant has not otherwise consented to service of summons upon it in actions brought in Ohio. An examination of the petitions in the instant cases discloses that neither petition states any cause of action in any way related to the business or activities of defendant in Ohio.
>
> "The question is not whether a plaintiff can maintain a suit against a non resident on a transitory cause of action arising outside Ohio and in no way related to the business or activities of the non resident in Ohio. The court has held that a plaintiff may where 'personal service is had' on such non resident (*Mattone* vs. *Argentina*, 123 Ohio St. 393, 175 N. E. 603) or the defendant has expressly or impliedly consented to service, as by making a voluntary general appearance in the action. *Handy* vs. *Insurance Co.*, 37 Ohio St., 366.
>
> "However, the doing of business in a state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against a corporation can be made in that state or otherwise consented to service of summons upon it in actions brought in that state, will not make the corporation subject to service of summons in an action in personam brought in courts of that state to enforce a cause of action in no way related to the business or activities of the corporation in that state. *Old Wayne*

Mutual Life Assn. of Indianapolis vs. *McDonough*, 204 U. S., 8, 22, 23, 51 L. Ed., 345, 27 S. Ct., 236; *Simon* vs. *Southern Rwy. Co.*, 236 U. S. 115, 129, 130 and 132, 59 L. Ed., 492, 35 S. Ct., 255. See, also, *Pennsylvania Fire Ins. Co. of Philadelphia* vs. *Gold Issue Mining & Milling Co.*, 243 U. S., 93, 95 and 96, 61 L. Ed., 610, 37 S. Ct., 344; *Robert Mitchell Furniture Co.* vs. *Selden Breck Construction Co.*, 257 U. S., 213, 215 and 216, 66 L. Ed., 201, 42 S. Ct., 84; *International Shoe Co.* vs. *Washington*, 326 U. S., 310, 319, and 320, 90 L. Ed., 95, 66 S. Ct., 154.

"An examination of the opinions of the Supreme Court of the United States in the foregoing cases will clearly disclose that service of summons in such an instance would be void as wanting in due process of law. This problem has given rise to a great volume of litigation. See annotations at 30 A. L. R., 255, and 96 A. L. R., 366. While there are many cases holding to the contrary, we believe that, if, as the foregoing Supreme Court decisions indicate, *service of a summons in such an instance would be void as wanting in due process of law within the meaning of that term as used in the 14th Amendment to the Constitution of the United States, this court should follow the law on such a federal constitutional question as announced in those decisions by the Supreme Court of the United States.* We are unable to reconcile the decisions in such cases as *Tauza* vs. *Susquehanna Coal Co.*, 220 N. Y., 259, 115 N. E., 915, with the views which have heretofore been expressed by the Supreme Court of the United States on this question arising under the federal Constitution. However, the Supreme Court of the United States apparently has distinguished the Tauza case and indicated that it would not go to the extent which the New York Court of Appeals went in sustaining the service of process in that case. *International Shoe Co.* vs. *Washington*, supra, 318, 319, 320. The cases of *Cone* vs. *New Britain Mach. Co.*, 20 F. (2nd), 593; *Bennett* vs. *Sinclair Refining Co.*, 144 Ohio St., 139, 57 N. E. (2nd), 776; *International Harvester*

Co. vs. *Kentucky,* 234 U. S., 579, 58 L. Ed., 1479, 34 S. Ct., 944; *Beach* vs. *Kerr Turbine Co.,* 243 F., 706; and *United States* vs. *Scophony Corp. of America,* 333 U. S., 795, 92 L. Ed., 1091, 68 S. Ct., 855, relied upon by plaintiff, all involved causes of action or complaints arising out of or related to business done in the jurisdiction where the action was brought."

It will be noticed in the syllabus of the case, which is the law in Ohio, the court has assumed Benguet was doing business in Ohio. There was ample evidence to justify this finding. After Pearl Harbor, Benguet could not do any business in the Philippines, and all business transactions emanated from the home and office of John W. Haussermann, the president, in New Richmond, Ohio. In New Richmond, bank accounts were established, directors meetings held, circulars for Securities and Exchange Commission were prepared, and all possible acts to continue Benguet in business were performed. It did not dissolve during the war, and consequently the headquarters for whatever business Benguet did, for which Haussermann as president continued to draw a salary, and for whatever business was performed or originated, was at New Richmond, Ohio.

It will be noticed from the opinion that the court has assumed that Benguet Consolidated Mining Company was "doing business" in Ohio. It is, therefore, not necessary to outline or consider the facts showing the business done or that the service was made on a managing agent. The entire question is that when a foreign corporation is doing business in Ohio, is it not subject to service of process solely on federal grounds because the cause of action was in no way related to the business of the corporation in the state.

On this point, the court did not review the evidence on the motion to quash, *but in deciding the cause merely examined the petitions in both causes of action.* Petitioner

concedes that the actions for dividends and damages arose outside of Ohio, but that there was a transfer agent in Ohio, directors meetings held in Ohio, deposits in Ohio banks, and in fact all of the business being done originated in Ohio. If it could not be sued in Ohio, it could not be sued any place other than the Philippine Islands, as all business it did was transacted in Ohio. Under such circumstances the petitioner would have to go to a foreign country for relief and prosecute her action before courts, whose decisions the highest tribunals in New York and California have said reeked with fraud in reference to this controversy.

SUMMARY OF ARGUMENT

Ohio has decided that so far as individuals are concerned under the provisions of Article I, Section 16 of the Ohio Constitution, if a non resident brings an action in the state court, obtains personal service on the non resident defendant, it does not matter whether the cause of action arose in Ohio or elsewhere. The decision of the Supreme Court of Ohio in this case specifically upheld this rule as to individuals, but held that a similar rule applied to foreign corporations would violate the due process clause of the Fourteenth Amendment.

We shall show that the decisions of this court have never made any such ruling, and that the court clearly misinterpreted the decision in *International Shoe Co.* v. *Washington,* 326 U. S. 310. Once the foreign corporation is "found" or is "present" in a state, there is no federal constitutional provision which requires the process to be quashed.

ARGUMENT

This is the first time that the exact question has been submitted to this court, although text writers, annotators and authors of legal articles have written much about the

jurisdiction over foreign corporations doing business in a state irrespective of where the cause of action arose.

The identical question was before this court in *Philadelphia and Reading Railway Company* v. *McKibbin*, 243 U. S. 265, but it was found unnecessary to decide, Justice Brandeis saying (pp. 268-9):

> "As the defendant did no business in New York we need not consider its other contention that it could not be sued there on a cause of action arising in New Jersey, and in no way connected with the business alleged to be done in New York. On this proposition we express no opinion."

The time to decide this proposition is now before the court. Benguet Consolidated Mining Company was doing business in Ohio, and was, therefore, present in Ohio. Since it was present, personal service on John W. Haussermann, the president and general manager, satisfied every constitutional requirement.

The Supreme Court of Ohio quashed the service of summons solely upon the ground that to uphold it would be a violation of the provisions of the Fourteenth Amendment. This, the Supreme Court of Ohio did on its own motion. In fact counsel for respondents in its brief made the concession that so far as the Constitution was concerned Benguet could be sued in Ohio whether the transaction arose outside of the state or not. Despite the decision in *Mattone* v. *Argentina*, 123 Ohio St. 393, counsel for respondent asked the court to apply the rule of *forum non conveniens*. At page 108 of the brief of respondents in the Supreme Court of Ohio we find this concession:

> "We do not mean to suggest that a non resident of the State of Ohio such as the Plaintiff, may not sue a non resident of the State of Ohio, such as Benguet, in any type of action, even though arising outside of the

> State of Ohio; but what we do say is that in ascertaining whether valid service of process has been made against a foreign corporation in any given case, the Court must consider the elements that Plaintiff and Defendant are non residents of the State and that the causes of action did not arise within the State out of anything done within the State; and, so considering these matters, the Court must estimate the inconveniences which would result to the foreign corporation by a trial away from its home or principal place of business."

The Supreme Court of Ohio, however, quashed the service by stating on its own initiative that it "should follow the law on such federal constitutional question as announced in those decisions by the Supreme Court of the United States" (R. 281).

An examination of the decisions cited by the court fail to show any support for the view taken. The truth is that the Supreme Court of Ohio misinterpreted the plain meaning and effect of *International Shoe Co.* v. *Washington*, 326 U. S. 310. There service was upheld, although the presence of the corporation in the State of Washington as that term had been construed was open to question. The court after discussing *Pennoyer* v. *Neff*, 95 U. S. 714, said at page 316:

> "But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to judgment in personam, *if he be not present*, within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notion' of fair play."

Judge Taft, speaking for the Ohio Supreme Court, misinterpreted these words. He read them and concluded that

even if the corporation was present in the state, there must be connected and related activities. It was for this reason he said that the decision of *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, could not be reconciled with the present law, even though in the *International Shoe Company* case, the *Tauza* case had been specifically cited with approval.

His concept of the constitutional aspects of service on foreign corporations is directly opposed to decisions in both the Second and Sixth Circuits.

Judge Learned Hand, in *Bomze* v. *Nardis Sportswear*, 165 F. (2d) 33, 35 (CCA 2), pointed out:

> "However, we understand that since *Tauza* vs. *Susquehanna Coal Co.*, supra, the law of New York has been that a 'foreign corporation' is either 'present' or is not; and once it is found to be 'present,' it becomes subject to process *regardless of whether the particular liability in suit has arisen out of the activities* which collectively constitute the presence."

Such a statement could hardly be the law even in New York if the federal Constitution prohibited causes of action to be entertained if they related to matters or activities of the corporation outside the state.

The court in the *International Shoe Company* case held that a foreign corporation either had to be present, or have certain minimal contacts in the state, such as were found later by a majority of this court in *Travellers Health Association* v. *Virginia*, 319 U. S. 641. No member of this court has ever said that there must be not only "presence" but also connected and related contacts to satisfy the due process clause.

The identical question arose in an Ohio case in the Sixth Circuit Court of Appeals some years ago, and that court upheld the service of summons even though the cause of action arose outside of Ohio. In that case, *Maichek* v.

Bertha Consumers Co., 25 F. (2d) 257 (CCA 6), after commenting on Sections 11276 and 11290, Ohio General Code, Judge Dennison said:

> "Construing that statute and the applicable general law, it must be taken as a settled rule in Ohio that a foreign corporation, actually doing business within the state and having therein a managing agent who is served, is subject to be sued therein upon a transitory cause of action arising outside of the state. *Handy* vs. *Ins. Co.*, 37 Ohio St. 366, 370; *Loftus* vs. *Pennsylvania R. R. Co.*, 107 Ohio St. 352, 140 N. E. 94. It is suggested, rather than distinctly claimed, that the state cannot rightly subject a foreign corporation to this burden (see *Robert Mitchell Furniture Co.* vs. *Selden Co.*, 257 U. S. 213, 216, 42 S. Ct. 84, 67 L. Ed. 201); but there has been no such distinct holding by the Supreme Court and we think we should accept the Ohio rule as affecting foreign corporations which locate themselves in the state for business purposes."

In other words, until the Supreme Court of Ohio held otherwise, the Ohio courts had always upheld service where the corporation was found or was present in the state, no matter where the cause of action arose. See also *Southwick Foundry and Machine Co.* v. *Franz Foundry Co.*, 48 F. (2d) 714 (CCA 6).

A state may exclude by statute or by judicial decision any non residents bringing actions in the state court where the cause arose outside of the borders of the state, but in *Barrow* v. *Kane*, 170 U. S. 100 it was held that such a type of action would not be barred in the federal courts. In that case, decided as far back as 1898, Mr. Justice Gray said (p. 106):

> "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

This rule was always followed in the Ohio courts prior to this decision. See *Rainey* v. *Maas*, 51 Fed. 580 (CCA 6), *Beach* v. *Kerr Turbine Co.*, 243 Fed. 706. There is no sound reason to assert that a foreign corporation has some attributes which distinguish it from a natural person so far as process is concerned. Personal service in this action was made on the President and General Manager of the Benguet Consolidated Mining Company. The court having found that Benguet was present in Ohio, it follows that service could not be voided.

The Supreme Court of Ohio attempted to establish *forum non conveniens* as a constitutional doctrine applicable to foreign corporations. The Republic of the Philippine Islands has been a foreign country since July 4, 1946. If the Ohio decision is permitted to stand, the petitioner, an American citizen, would be forced to go to a foreign country to enforce her rights before courts which have demonstrated marked unfriendliness. The President and General Manager of Benguet Consolidated Mining Company is in this jurisdiction as well as the stock transfer agent and directors. Even in the federal courts, the rule of *forum non conveniens* would not be applicable under such circumstances. Cf. *Swift & Co.* v. *Compania Del Caribe*, 339 U. S. 684.

However, the rule of *forum non conveniens* is not a constitutional rule. The doing of business is a much stronger term than mere presence. A finding that a corporation is doing business "makes irrelevant any question of *forum non conveniens*." *Kilpatrick* v. *Texas & Pacific Ry. Co.*, 166 F. (2d) 788, 790, 791 (CCA 2).

The Supreme Court of Ohio failed to recognize the distinction aptly made by Judge Learned Hand in *Latimer* v. *S/A. Industrias Reunidas*, 175 F. (2d) 184, 186 (CCA 2):

> "It may still be true that in theory the issue as to jurisdiction is different from that as to *forum non*

conveniens; for due process may be compatible with situations of greater inconvenience to the corporation than those inconveniences which would support the plea."

In this case there is no necessity for theoretical discussion. The doing of business clearly implies the presence of the foreign corporation in Ohio. Even if a non constitutional plea of *forum non conveniens* were made, this court would not and should not compel an American citizen to go to a foreign country to enforce her rights when the foreign corporation sued is present in Ohio.

CONCLUSION

For the reasons stated the decision of the Supreme Court of Ohio should be reversed, and a finding made that Benguet Consolidated Mining Company was properly served in Ohio.

Respectfully submitted,

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